UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

Houston, Texas

DTM CORPORATION

Employer

and Case No. 16-RC-10692

INTERNATIONAL UNION SECURITY, POLICE
AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Petitioner

and

INDUSTRIAL, TECHNICAL & PROFESSIONAL
EMPLOYEES UNION (ITPE)

Intervenor

DECISION AND DIRECTION OF ELECTION

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and/or regular part-time security guards performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by DTM Corporation at 1-90 Tracon - Federal Aviation, Houston, Texas. The Petitioner seeks to exclude from the unit all office clerical employees, professional employees, supervisors, as defined in the Act, as amended, and all other employees.

The Intervenor asserts that the petition should be dismissed, because, at the time it was filed, the petition was barred by a contract between Intervenor and The Diamond Group, a predecessor employer of the employees in the petitioned-for unit.

ISSUES PRESENTED

The issue before me is whether the collective bargaining agreement between The Diamond Group and Intervenor bars the petition filed by Petitioner seeking to represent the same unit of employees now employed by the Employer, a successor to The Diamond Group.

THE REGIONAL DIRECTOR'S FINDINGS

A hearing officer of the National Labor Relations Board conducted a hearing on this matter and the parties waived post-hearing briefs.[1] Based on the record evidence, I find that, pursuant to the Board's decision in ***MV Transportation***, 377 NLRB 770 (2002), the contract between The Diamond Group and Intervenor does not bar the petition filed by Petitioner and direct that an election be held according to the terms described below.

STATEMENT OF FACTS

The Employer, a District of Columbia corporation, is a security services provider that conducts business in Texas. Its main office is in Silver Springs, Maryland. The Employer is under contract to provide security services at FAA Tracon Tower in Houston, Texas. Intervenor is a mixed-unit Union, which admits guard and non-guard employees into its membership. Petitioner admits only guards to membership in the union.

On August 18, 2004, The Diamond Group was under contract to provide security services at Tracon Tower in Houston, Texas. On August 18, 2004, The Diamond Group signed a collective bargaining agreement renewing its voluntary recognition of Intervenor as "the sole bargaining agent for all of its non-supervisory Guard Service employees at the Tracon Tower and the ARTCC in Houston, Texas, excluding all managerial employees and

[1] The Employer, DTM Corporation, did not make an appearance on the record; therefore, its position on this and other matters is unknown.

supervisors, as defined in Section 2 of the National Labor Relations Act, as amended." [2] The effective dates of the collective bargaining agreement are August 15, 2004, to August 14, 2007. The contract covers terms and conditions of employment, including, but not limited to, wages, overtime, sick leave, vacation, and pensions.

Some time before September 29, 2005, the Employer was awarded the contract previously held by The Diamond Group to provide security services at Tracon Tower in Houston, Texas. The effective date of that contract was October 1, 2005. During the week prior to October 1, 2005, DTM Site Supervisor Joe McGrew visited Tracon Tower on several occasions to aid in the transition from The Diamond Group. During that time, McGrew directed employees of The Diamond Group in some facets of their work. About the same time McGrew began work at Tracon Tower, he told The Diamond Group employees that they would need to complete an application if they wanted to continue to work at the Tracon site. Employees picked up the applications on personal time at another location.

The contract between DTM and the United States Government requires that all employees pass a shooting skills test and attend an orientation meeting before they may take control of their posts. On September 28 and 29, 2005, employees of The Diamond Group working at Tracon Tower went on personal time to an off-site shooting range to pass the shooting skills requirement. The test lasted between one and one-half hours to two hours. DTM stated that it would pay the employees for their time taking the test.[3] Upon passing the shooting requirement, employees were told that they were hired and were

[2] The unit description in the contract actually states Dallas-Fort Worth, Texas, not Houston, Texas, and omitted the ARTCC. The parties stipulated that the bargaining unit is as described above.
[3] The pay period in which this time will be paid had not been processed at the time of the hearing.

issued uniforms. DTM hired all employees of The Diamond Group working at Tracon Tower.

On September 29, 2005, the Petitioner filed its petition seeking to represent the following bargaining unit:

> Included: All full-time and/or regular part-time security guards performing guard duties as defined in section 9(b)(3) of the National Labor Relations Act, as amended, employed by DTM Corporation at 1-90 Tracon - Federal Aviation Administration, Houston, Texas; and
>
> Excluded: All office clerical employees, professional employees, supervisors, as defined in the Act, as amended, and all other employees.

On September 30, 2005, employees of The Diamond Group working at Tracon Tower who wished to work for DTM were required to attend an orientation meeting. DTM stated that it would pay the employees for their time attending the orientation.

On October 1, 2005, at 12:01 a.m., McGrew covered the shifts of guards on duty so that they could change from The Diamond Group uniforms into DTM uniforms. Prior to October 1, 2005, The Diamond Group paid all employee wages, except for the after hours, off-site shooting test and orientation paid by DTM.

On October 5, 2005, Employer signed a voluntary collective bargaining agreement recognizing Intervenor as the sole bargaining representative of Employer's non-supervisory guards at Tracon Tower.

ANALYSIS

In this case, the Intervenor seeks to use a contract it has with an employer to bar a petition filed by rival union seeking to represent the employees of the successor employer. Based on the Board's holding in ***MV Transportation***, 337 NLRB 770 (2002), that a prior contract may not bar a petition seeking to represent a successor's employees and because

the Petitioner seeks to represent the employees of a successor employer, I find that the petition is not barred and direct that an election be held according to the terms describe below.

The Petition Is Not Barred Because the Employer Is a Successor Employer

As referenced above, the collective bargaining agreement between the Intervenor and The Diamond Group will not bar the petition in this matter covering the employees of the Employer. In support of this proposition, I note that the purpose of the Act is to ensure: 1) industrial stability and 2) freedom of choice by employees in the selection of their bargaining representative. ***MV Transportation***, 337 NLRB 770, 772-73 (2002); ***Montgomery Ward & Co.***, 137 NLRB 346, 347-48 (1962). In forming law and ruling on cases, the Board bases its decisions in substantial part on these two ideals. In ***MV Transportation***, 337 NLRB 770 (2002), the Board overturned its decision in ***St. Elizabeth Manor, Inc.***, 329 NLRB 341 (1991), and returned to the precedent set forth in ***Southern Molding***, 219 NLRB 119 (1975), and its progeny. It held that "an incumbent union in a successor employer situation is entitled only to a rebuttable presumption of continuing majority status, which will not operate to bar an otherwise valid decertification, rival union, or employer petition." ***MV Transportation***, 337 NLRB at 773. The Board determined that the purposes of the Act described above are appropriately balanced when predecessor contracts are not permitted to bar employees from selecting their representative under a successor employer. ***MV Transportation***, 337 NLRB at 773-74.

In forming its successor no-bar policy, the Board recognized that, by allowing petitions to proceed, employee free choice is reinforced because the employees who have experience with the incumbent union's performance "can determine whether the union is

adequately representing their needs during the period of transition, or whether another representative or the employees themselves might be more effective in dealing with the prospective employer." ***Id.*** at 773.

As to industrial stability, the Board determined that the successor no-bar rule promotes bargaining relationship stability by granting the incumbent union a presumption of continued majority status and places on the successor employer a duty to bargain with that union, absent a valid petition or proof that it has lost that majority status. ***Id***. at 773-74.

A successor employer exists and must bargain with the bargaining representative of its predecessor's employees, absent a petition, if: "1) there is substantial continuity between the predecessor employer's and the successor employer's operations; and 2) the successor employer hires a majority of its employees from among the predecessor's employee complement." ***Id.***; See also ***NLRB v. Burns International Security Services, Inc.***, 406 U.S. 272 (1972). In the instant case, Employer is clearly a successor employer to The Diamond Group. It performs the same work at the same location as The Diamond Group and it hired The Diamond Group's entire Tracon Tower staff to perform the duties pursuant to its contract with the United States Government. Because the Employer is a successor to The Diamond Group, the Intervenor's contract with The Diamond Group may not bar the petition in this case.

Voluntary Recognition by a Successor Employer Does Not Act As a Petition Bar

In returning to its ***Southern Molding*** precedent, the Board reaffirmed that a successor employer's voluntary recognition of an incumbent union does not preclude the processing of a properly filed petition. ***MV Transportation***, 337 NLRB at 771-72; see also ***Harley-Davidson Transportation Co.***, 273 NLRB 1531 (1985). In the instant case, the

petition was filed on September 29, 2005. The Employer voluntarily recognized the Intervenor as the exclusive bargaining representative of its Tracon Tower employees by signing a collective bargaining agreement on October 5, 2005. Based on the Board's ruling in ***MV Transportation***, Employer's post-petition recognition of Intervenor will not act as a bar to the petition filed by the Petitioner.

The Contract Bar Doctrine Does Not Apply In the Instant Case

As set forth above, the instant petition is not barred based on the Employer's status as a successor employer. Additionally, the contract bar doctrine does not apply in the instant case. The contract bar doctrine prevents non-party unions from filing petitions seeking to represent already represented employees, except in limited circumstances. The Board has held that the contract bar doctrine promotes the purposes of the Act by affording contracting parties and employees "a reasonable period of stability in their relationship without interruption" while giving employees "the opportunity, at reasonable times, to change or eliminate their bargaining representative if they wish to do so." ***Id***. at 348. The Board has recognized, however, that the contract bar doctrine is not absolute and "may, in the Board's discretion, be applied or waived as the facts of a given case demand in the interest of stability and fairness in collective bargaining." ***Id***, at 349-50.

The inapplicability of the contract bar doctrine in the instant case is highlighted by the failure of the contract to meet all the requirements necessary to establish that a bar to the petition is appropriate. To serve as a bar to a petition, a contract must, including other things: 1) contain substantial terms and conditions of employment; 2) clearly state both the effective date and the expiration date of the contract; 3) embrace an appropriate unit; and 4) clearly encompass the employees sought in the petition. ***Appalachian Shale Products Co.***,

121 NLRB 1160, 1163-64 (1958); See also ***South Mountain Healthcare and Rehabilitation Center***, 344 NLRB No. 40, 2 (2005).

Although the evidence is clear that the contract between The Diamond Group and the Intervenor contains substantial terms and conditions of employment, clearly states the effective dates of the contract, and embraces an appropriate unit, it is clear that the contract does not encompass the employees sought in the petition. In fact, the contract and the petition apply to the employees of two different employers, The Diamond Group and DTM, respectively. Because the employers differ in the contract and the petition, the contract unit does not clearly encompass the employees in the petition; therefore, the contract cannot bar the petition.

Applying the Contract Bar Doctrine in this Case Does Not Further the Purposes of the Act

Allowing the contract between The Diamond Group and the Intervenor to bar the instant petition will not promote industrial stability because the established bargaining relationship governed by the contract at issue no longer exists and has not existed since two days after the petition was filed. When The Diamond Group's contract at Tracon Tower expired on September 30, 2005, so did its contract with the Intervenor. With the expiration of the contract, The Diamond Group no longer employed guards at Tracon Tower, and therefore, employed no bargaining unit members.

The only remaining relationship where stability is an issue is between the Intervenor and the Tracon Tower employees. However, a sufficient number of those employees have declared, by way of the instant petition, that they would prefer to be represented by Petitioner. Allowing the contract between The Diamond Group and the

Intervenor to bar the petition would, therefore, constrict employee free choice while maintaining a potentially unwanted relationship.

The contract between the Intervenor and The Diamond Group terminated one day after the filing of the petition. Allowing this obsolete contract between The Diamond Group and Intervenor to bar the petition in this case will not effectuate the purposes of the Act, and thus, I will direct an election according to the terms described below. See ***The Mosler Safe Company***, 216 NLRB 9, 10 (1974) ("The Board has held that a petition will not be dismissed, even though prematurely filed, if a hearing is directed despite the prematurity of the petition and the Board's decision issues on or after the 90th day preceding the expiration day of the contract.")

Intervenor May Not Be a Party to the Election Because It Admits Non-Guard Members

Although I am directing an election in this matter, the Intervenor may not participate in the election directed herein because it admits non-guard members to its membership. Section 9(b)(3) of the Act states: "But no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

The Intervenor admits that it is a "mixed guard" union, but it points to the Board decisions in ***Temple Security***, 337 NLRB 372 (2001) and ***Stay Security***, 331 NLRB 252 (1993), in support of its position that its contract with The Diamond Group should bar the petition in this matter. In both ***Temple Security*** and ***Stay Security***, the Board considered situations where employers voluntarily recognized mixed guard unions and later sought to avoid their bargaining obligations by invoking Section 9(b)(3). In both cases, the Board

determined that an employer may lawfully recognize a mixed guard union without violating Section 9(b)(3), and, with that recognition, bind themselves to the requirements of the Act, with minimal exceptions.

The cases cited by the Intervenor are inapposite to the instant case. As is clearly noted in both cases, the Board will not certify a mixed guard union as a bargaining representative. ***Temple Security***, 337 NLRB at 372-73; ***Stay Security***, 311 NLRB at 252; See also ***The University of Chicago***, 272 NLRB 873 (1984). Because I am directing an election in this case and because Intervenor admits non-guards into membership, I determine that Intervenor may not be a party to the election in this case.

The Bargaining Unit Sought By Petitioner Is Appropriate

The parties in this proceeding stipulated that the petitioned-for unit is an appropriate unit. In evaluating the appropriateness of a bargaining unit under Section 9(b) of the Act, the Board has broad discretion to decide whether or not a unit is appropriate for the purposes of collective bargaining. ***So. Prairie Construction v. Operating Engineers Local 627***, 425 U.S. 800 (1976). The statute does not require that a unit be the only appropriate or the most appropriate unit, rather, the Act only requires that the unit be "appropriate." ***Overnite Transportation Co***., 322 NLRB 723 (1996).

To determine the appropriateness of a bargaining unit, the Board determines if the employees who will make up the bargaining unit have a community of interest. ***NLRB v. Paper Manufacturers Co.***, 786 F.2d 163, 167 (3rd Cir. 1986). This community of interest test consists of seven factors:

> 1) integration of operations; 2) centralization of managerial and administrative control; 3) geographic proximity; 4) similarity of working conditions, skill, and function; 5) common control over labor relations; 6) collective bargaining history; and 7) interchangeability of employees.

Id. These seven factors are to be applied to the facts in a case and weighed against each other to determine if the petitioned for unit is appropriate. ***Hotel Services Group,*** 328 NLRB 116 (1999).

The record reflects that all bargaining unit employees: 1) provide guard services; 2) work at the same location; 3) share the same working conditions, including health benefits, vacation pay, sick and military leave, and uniform benefit; 4) currently work under the same bargaining agreement; and 5) have a history as a bargaining unit. Additionally, as referenced above, the parties stipulated that the Unit petitioned for by Petitioner is an appropriate unit. Because the employees sought to be included in the bargaining unit share a community of interest, I find that the unit is appropriate and will direct that an election be conducted according to the terms set forth below.

CONCLUSION AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Petitioner and Intervenor stipulated that during the past twelve months, a representative period, DTM Corporation, a District of Columbia corporation, has been engaged in the provision of guard services to the United States valued in excess of $50,000. Based upon these operations, the Employer has a substantial impact on the national defense of the United States. During the past twelve months, the Employer provided services valued in excess of $50,000 in states other than the State of Texas.

Although the Employer did not appear as a party on the record in this matter, I take administrative notice of the Stipulated Election Agreements signed by the Employer in Case Nos. 5-RC-15619 and 5-RC-15638, on September 23, 2003, and October 29, 2003, respectively, wherein the Employer stipulated that it was a District of Columbia corporation providing security services for firms and institutions located throughout the United States and that, during the twelve months prior to these stipulations, it performed services valued in excess of $50,000 in states other than Virginia.

3. The Petitioner claims to represent certain employees of the Employer.

4. The parties stipulated to the Petitioner's status as a labor organization.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6*)* and (7) of the Act.

6. The following employees of the Employer constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and/or regular part-time security guards performing guard duties as defined in section 9(b)(3) of the National Labor Relations Act, as amended, employed by DTM Corporation at 1-90 Tracon - Federal Aviation Administration, Houston, Texas.

Excluded: All office clerical employees, professional employees, supervisors, as defined in the Act, as amended, and all other employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Union Security, Police and Fire Professionals of America (SPFPA).

The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Resident Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Houston Resident Office, Federal Office Building, Suite 1545, 1919 Smith Street, Houston, Texas 77002, on or before November 4, 2005. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 817-978-2928. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Resident Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by 5:00 p.m. EST, on November 14, 2005. The request may not be filed by facsimile.

In the Resident Office's initial correspondence, the parties were advised that the National Labor Relation Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the attachment supplied with the Resident

Office's initial correspondence for guidance in doing so. The guidance may also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Dated: October 28, 2005

/s/ Curtis A. Wells

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